TENGKU RAZALEIGH BIN TENGKU MOHD. HAMZAH

v.

THE ELECTION JUDGE FOR ELECTION PETITION NO. 33-6-1995 & 4 ORS.

HIGH COURT MALAYA, KOTA BHARU
DATO' ARIFIN BIN ZAKARIA J
[ORIGINATING MOTION NO. 25-21 OF 1995]
28 OCTOBER 1995

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application to quash decision of Election Judge - Decision not appealable - Whether the Election Judge is inferior or superior tribunal - Whether cognizance of election petition an extension of or addition to ordinary jurisdiction of High Court - Section 36 Election Offences Act 1954.*

JURISDICTION: *Doctrine of binding precedent - Whether earlier decision of Supreme Court provides binding ratio decidendi - Whether inferior Court can disregard binding decision.*

The applicant was returned to the Gua Musang Parliamentary constituency in the April 1995 General Elections. The 2nd respondent's (Husein bin Ahmad) nomination paper was rejected by the returning officer for the said constituency. The 2nd respondent filed an election petition against the decision of the returning officer and sought, *inter alia*, declarations that the election in the constituency was invalid and the applicant was not properly elected. On 1 August 1995 the Election Judge allowed the petition and allowed the applicant to pay costs and also ordered that the election for the constituency was void.

The applicant, being dissatisfied with the decision of the Election Judge, sought leave of the High Court pursuant to O. 53 r. 1(2) Rules of the High Court to apply for an order of *certiorari* to quash the said decision. By the time, the application was heard, the applicant had been returned to the same constituency in a bye-election. Although the application was of academic interest, the applicant contended that he should not be ordered to pay the costs of the election petition whereas the blame for the rejection of the 2nd respondent's nomination paper was on the returning officer and/or the election commission.

It being settled law by virtue of s. 36 of the Election Offences Act 1954 that the decision of an Election Judge is final and not appealable, the following issues arose for consideration:

(i) whether a decision of the Election Judge is amenable to the order of *certiorari* or not;

(ii) whether the Supreme Court decision of *Ignatius Stephen Malanjum v. Election Judge, Sabah* was binding on this Court;

(iii) whether justice should prevail over the rationale of expediency in s. 36;

(iv) as the Election Judge or Election Court is not mentioned in Art. 121 Federal Constitution and the Courts of Judicature Act 1964, whether it is an inferior tribunal or Court.

Held:

[1] It is settled law that *certiorari* would only lie against an inferior tribunal to bring the proceedings of that tribunal before the High Court for review so that the Court can determine whether to quash such proceedings. The order cannot be directed by the High Court to any tribunal which is a branch of the High Court for the purpose of quashing its proceedings.

[2] In *Ignatius Stephen Malanjum v. Election Judge, Sabah*, the High Court held that an Election Court is not an inferior Court against which an order of *certiorari* or prohibition can be issued. The Supreme Court affirmed the High Court decision in an oral judgment, even though several questions were left unanswered. There is a discernible *ratio decidendi* to be found in the Supreme Court judgment i.e. that an Election Judge's decision is not amenable to the prerogative order of *certiorari* or prohibition. That *ratio* is a binding precedent upon this Court and this Court cannot ignore the doctrine of precedent to disregard it.

[3] The question of justice having to prevail over expediency is one of policy rather than of law and should best be left to the wisdom of Parliament to decide on the issue. Elections and all rights and liabilities relating to it are creatures of statutory law. The task of the Courts is only to interpret the relevant statutes and declare the law, not to pass judgment as to the wisdom or propriety of statutory provisions.

[4] The question whether a tribunal is an inferior Court or is subject to judicial review by the High Court depends on the precise nature and powers of the tribunal. The fact that an Election Judge comprises the Chief Judge or a High Court Judge nominated by the Chief Judge is not a conclusive factor in determining whether the Election Judge is a superior or inferior tribunal. As the Judge of the Federal Court, Court of Appeal and the High Court are Judges of the Superior Court envisaged by Art. 121 Federal Constitution and the Courts of Judicature Act, an election petition is a proceeding in the High Court and cognizance of such a petition is an extension of, or addition to the ordinary jurisdiction of the High Court, against which *certiorari* cannot issue.

[Application dismissed].

Cases referred to:
Devan Nair v. Yong Kuan Teik [1967] 1 MLJ 261 ***(foll)***
Dason Gaban v. Zulkiflee bin Majun & Ors. [1982] 1 MLJ 315 ***(foll)***
Ignatius Stephen Malanjum v. Election Judge Sabah & Anor. [1989] 2 MLJ 433 ***(foll)***
Wilkinson, R.O.V. v. Sibley [1932] 1 KB 194 ***(refd)***
Cassell & Co. Ltd. v. Broome [1972] 1 All ER 801 ***(foll)***
Sundralingam v. Ramanathan Chettiar [1967] 2 MLJ 211 ***(refd)***
Reg. v. Cripps, Ex. P. Muldoon (DC) [1984] 1 QB 68 ***(refd)***
Goonesinha v. Hon. C.L. De Kretser [1945] AC 63 ***(foll)***
Oral Judgment of Supreme Court CA No. 03-42-89 (Ignatius Stephen Malanjum v. Election Judge Sabah & Anor.) ***(foll)***

Legislation referred to:
Ceylon (State Council Elections) Order in Council 1931, Art. 75
Court of Judicature Act 1964
Election Offences Act 1954, ss. 33(1), 36, 37
Federal Constitution Articles. 118, 121
Rules of the High Court 1980, O. 53 r. 1(2)

Other sources referred to:
Halbury's Laws of England, 4th Edn., para. 147
Law of Indian Elections and Election Petition, 3rd Edn., p. 253

For the applicant - Dr. Hj. Mohamed Salleh Abas; (Dr. Yaakob Merican with him); M/s. Salleh Abas Yaakob & Sofiah
For the respondents - Stanley Isaacs (Ahmad Zaki b. Mohd Daud with him); AG's Chambers

JUDGMENT

Arifin Zakaria J:

The applicant, Tengku Razaleigh bin Tengku Mohd Hamzah, is a well known political figure in this country, having served as a member of the cabinet and now is a leader of an opposition party, Parti Melayu Semangat 46. In the recent general election the applicant was returned to the Parliamentary Constituency of the Gua Musang ("the said Constituency"); and in the same election, the nomination paper of Husein bin Ahmad (2nd respondent herein) was rejected by the returning officer for the said Constituency. The 2nd respondent being dissatisfied with the decision of the returning officer then filed the election petition bearing reference PP-33-6-1995 ("the petition"). In the petition the 2nd respondent sought the following orders from the Election Judge (the 1st respondent herein):

(a) a declaration that the election in the Parliamentary Constituency P. 32 Gua Musang, Kelantan was invalid;

(b) a declaration that the applicant herein was not properly elected or declared as successful or won and/or should not have been chosen a successful candidate for the Parliamentary Constituency P. 32 Gua Musang, Kelantan.

(c) Confirmation and directions under the provisions of s. 36 of the Election Offences Act 1954;

(d) Costs of the said petition, and

(e) Any other order or relief as the Court deems just.

By order dated 1 August 1995 the Election Judge allowed the petition and further ordered that the 1st, 3rd and 4th respondents in the said petition to pay the costs of the petition to be taxed. Further, pursuant to ss. 36 and 37 of the Election Offences Act 1954 ("the Act"), the Election Judge issued the certificate certifying, *inter alia*, that the election for the said Constituency held on 25 April 1995 was void and that the applicant herein was not properly elected or should not have been declared as elected and the Election Commission was to issue an election notice within one month from the date of the certificate. The applicant was dissatisfied with the decision of the Election Judge and is now seeking leave of this Court pursuant to O. 53 r. 1(2) of the Rules of the High Court 1980 ("RHC") to apply for an order of *certiorari* to quash the said decision.

By the time this application came up for hearing a by-election had been held for the said Constituency and again the applicant had been returned to the said Constituency. As stated by the learned Counsel for the applicant, as far as the applicant is concerned, this application is merely of academic interest, except for the question of costs. The applicant's Counsel contends that the applicant should not have been ordered to pay the costs of the petition. The applicant, he says, was an innocent party. If any one is to be blamed for the rejection of the nomination paper of Husein bin Ahmad, it is the returning officer and/or the Election Commission and they alone should have been ordered to pay the costs of the petition not the applicant.

At the outset I should state that the decision of the Election Judge is by virtue of s. 36 of Act final and not appealable. This proposition of law is supported by the case of *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261, a decision of the Privy Council, which was followed

by the Federal Court in *Dason Gaban v. Zulkiflee bin Majun & Ors.* [1982] 1 MLJ 315. The underlying philosophy behind the above decisions was stated by Suffian LP in *Dason Gaban* at p. 316 of the report in the following terms:

> Our decision was much influenced by the philosophy behind the legislation in England and other commonwealth countries, on which our own Act is modelled, and that is that constitutionally the validity of an election was decided by the Assembly for which the election was held, that historically it used to be so decided, but in the course of the 19th century many countries adopted the view that, as the deliberations of the Assembly itself were apt to be governed by political considerations rather than by the justice of the case, it was right and proper that such questions should be entrusted to independent and impartial Courts. This required legislation in every case, and in many cases the right of appeal after the hearing of an election petition by the election tribunal to which those hearings were entrusted was severely limited, clearly for the reason that it was essential that such matters should be determined as quickly as possible, so that the Assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment. This philosophy may be gleaned from many of the decisions cited to us, and in particular from *Devan Nair*, p. 262.
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> Section 36 of the Act gives effect to this philosophy by providing that at the conclusion of the trial of an election petition the Election Judge must determine whether the candidate whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and must certify such determination to the authorities set therein and that "upon such certificate being given such determination shall be final.

The learned Counsel for the applicant submits that, in the circumstances, the only avenue open to the applicant is to apply for an order of *certiorari* to this Court to quash the decision of the Election Judge. This brings into issue the question whether the decision of the Election Judge is amenable to the order of *certiorari* or not.

It is settled law that *certiorari* would only lie against an inferior tribunal "to bring the proceedings of that tribunal before the High Court for review so that the Court can determine whether they shall be quashed, or to quash such proceedings": see para. 147 *Halbury's laws of England*, 4th Edn. The order cannot be directed by the High Court to any tribunal which is a branch of the High Court for the purpose of quashing its proceedings. Hence, the application before me turns on the question whether the Election Judge is an inferior or superior tribunal. Similar issue had come to be considered by the High Court in the case of *Ignatius Stephen Malanjum v. Election Judge Sabah & Anor.* [1989] 2 MLJ 433, wherein the applicant had applied to the Court under O. 53 r. 1(2) of the RHC, *inter alia*, for leave for an order of *certiorari* to quash the decision of the Election Judge, Sabah. Mohamad Noor J dismissed the said application with costs. In his judgment at p. 434, after having considered the relevant provisions of the Federal Constitution and the Act and the Rules made thereunder, the learned Judge concluded:

> Having regard to the aforesaid provisions of the law, I conclude that the election Judge sits in the High Court exercising his powers relating to election petitions in accordance with the election law, which is a special law. And he exercises his powers in the same jurisdiction and holds coordinate jurisdiction. Therefore, the Court in which the election Judge sits is not an inferior Court against which an order of *certiorari* or prohibition can be issued. The fact that, under r. 21, it appears that only a Judge of the High Court can dispense with the required affidavit or cause shown does not alter the position because the rule is so enacted on account of expediency and convenience.

The decision of the Mohamad Noor J was affirmed by the Supreme Court comprising of Lee Hun Hoe CJ (Borneo), Harun Hashim and Mohd. Yusoff Mohd SCJJ: see Supreme Court CA No. 03-42-89. In the oral judgment delivered by Lee Hun Hoe CJ (Borneo) the Court gave the following reasons:

> There is no Election Court as such. What happens is that the Election Judge sits in the High Court to hear the election petition. He constitute a special Tribunal. In view of the peculiar nature of the jurisdiction of the tribunal and the importance of the public interest of securing at an early date a final determination of an election petition the legislature has clearly created the special tribunal where the ordinary incident of appeal does not apply.
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> With respect, having regard to the relevant provisions of the election legislation and authorities cited, we agree with the Learned Judge that the Court in which the Election Judge sits is not an inferior Court against which an order of *certiorari* or prohibition could be issued.

In the concluding paragraph the Court stated, "Further reasons will be given later, if necessary." No further reasons had since been delivered.

The learned Counsel for the applicant submits that the judgment of the Supreme Court was merely rubber stamping the decision of Mohamad Noor J as it did not go any further than what Mohamad Noor J had said in his judgment. He then invited the Court to consider whether Mohamad Noor J was right in coming to the conclusion that, "... the Court in which the election Judge sits is not an inferior Court against which an order of *certiorari* or prohibition can be issued." What was meant by the phrase, "And he exercises the same jurisdiction and holds coordinates jurisdiction." used by the learned Judge. The learned Counsel submits that these questions need to be answered either by this Court or the appellate Courts. With respect, I agree with the learned Counsel that the Supreme Court in confirming the decision of Mohamad Noor J had left several questions unanswered. However, the Supreme Court makes it abundantly clear in its oral judgment that there is no election Court as such in this country, An Election Judge sits in the High Court to hear election petition and the Election Judge in a way constitutes a special tribunal. Further, the Supreme Court wholly agrees with the decision of Mohamad Noor J that an order of *certiorari* or prohibition would not lie against the decision of the Election Judge. The learned Senior Federal Counsel submits that, based on the doctrine of precedent, this Court is bound by the decison of the Supreme Court. The learned Counsel for the applicant, however, urges this Court to disregard the decision of the Supreme Court on the ground that the Supreme Court's judgment does not provide any *ratio decidendi* which is binding on this Court. With respect, I find no merit in the submission of the learned Counsel. There is, in my judgment, a discernible *ratio decidendi* to be found in the said judgment that is: the Election Judge's decision is not amenable to the prerogative order of *certiorari* or prohibition. That *ratio* is no doubt a binding precedent upon this Court and it is not open to this Court to disregard it even if this Court were of the view that the Supreme Court had arrived at a wrong decision.

The position of the Supreme Court (now Federal Court) is similar to that of the House of Lords in England. There, the decisions of the House of Lords are binding on every Court inferior to it: see *Wilkinson, R.O.V. v. Sibley* [1932] 1 KB 194. In *Cassell & Co. Ltd. v. Broome* [1972] 1 All ER 801, L. Hailsham LC had in particularly strong terms put this issue to rest where at p. 809 he said:

> Moreover, it is necessary to say something of the direction to Judges of first instance to ignore *Rookes v. Barnard* as 'unworkable'. As will be seen when I come to examine when the Court of Appeal described the decision in *Rookes v. Barnard* as decided '*per incuriam*' or

> 'unworkable' they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to Judges of first instance to ignore decision of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put Judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lords Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.
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> The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of Courts which exist in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers.

On the same theme, Ong Hock Thye FJ, in *Sundralingam v. Ramanathan Chettiar* [1967] 2 MLJ 211, at p. 213 said:

> Each Court, of course, is bound by the decisions of Courts above it, but "individual Judges are not bound by each other's decisions, although judicial courtesy naturally requires that they do not lightly dissent from the considered opinions of their brethren": see *Law in the Making* (6th Edn.) p. 231.

On the above authorities, it is beyond doubt that this Court is in no position whatsoever to disregard the decision of the Supreme Court which is the highest Court of the land. To suggest that this Court is at liberty to do so is clearly an invitation to this Court to ignore the doctrine of precedent which has been an inalienable part of our legal system.

What I have said above could have sufficiently disposed of this application, however, I feel, I need to state my observations on the several other points raised by both Counsel before me. Firstly, it is submitted by the learned Counsel for the applicant that it is fair enough to say that there should not be an appeal from the decision of Election Judge for reason of expediency but expediency, he contends, should not be at the expense of justice and where the two conflict the latter should prevail. In my view the question raised by the learned Counsel is one of policy rather than of law and, therefore, I respectfully agree with the learned Senior Federal Counsel that it should best be left to the wisdom of Parliament to decide on the issue. Election and all rights and liabilities relating to it are the creatures of statutory law: see *Law of Indian Elections and Election Petitions* at p. 253, 3rd Edn., Therefore, the task of the Courts is only to interpret the relevant statutes and declare the law; and it is certainly not the task of the Courts to pass judgment as to the wisdom or propriety of the statutory provisions. The redress to such issues is to be found elsewhere and not in the Courts.

Further, Counsel for the applicant submits that the Supreme Court had not properly considered or failed to consider the provisions of Articles 118 and 121 of the Federal Constitution and the Courts of Judicature Act 1964, and for that reason the Supreme Court had fallen into error. He contends that Art. 118 merely provides that an election petition is to be presented to the High Court and it does not say that no order of *certiorari* would lie against the decision of the Election Judge. He further contends that by Art. 121 the judicial power of the Federation

is vested in two High Courts, the Court of Appeal and the Federal Court. These Courts constitute the superior Courts. The Election Judge or the Election Court, he says, is not anywhere mentioned in Art. 121 or the Courts of Judicature Act and it may therefore be said that it is neither a superior tribunal or Court. Since it is neither a superior tribunal or Court, therefore, it has to be either an inferior tribunal or Court and as such, its decision is amenable to the prerogative order of *certiorari*. The learned Senior Federal Counsel on the other hand, contends that the question whether a tribunal is a superior Court or is subject to judicial review by the High Court depends in each case on the precise nature and powers of the tribunal. The case of *Reg. v. Cripps, Ex. P. Muldoon (DC)* [1984] 1 QB 68 was cited as the authority in support. The *dictum* of Robert Goff LJ, in the same case in relation to parliamentary election Court may be relevant to the present case, where at p. 87, he said:

> The matter here is complicated by the fact that, as we have seen, there are two types of election Court. We are only concerned with what we have called a local election Court; and we do not think it would be right in this judgment to express any opinion on the position of a parliamentary election Court. We recognise that it might perhaps be thought anomalous if one type of election Court should be subject to judicial review, and the other not. That was, however, the conclusion contemplated by Lord Widgery CJ in *Reg. v. Election Court, Ex parte Sheppard* [1975] 1 WLR 1319. In this unreserved judgment in that case he expressed the opinion, *obiter*, at p. 1323:
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> > It is quite clear that the election Court which deals with parliamentary elections, consisting, as it will do, of a Queen's Bench Judge, is a superior Court and it is clear that no question of the prerogative orders could be available there. But it is not so clear whether the same applies to a barrister appointed under s. 115, as the election Court for local government election.
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> While expressing no opinion about the status of a parliamentary election Court, we think it right to comment that, having (we believe) heard fuller argument and a more copious citation of authority than did the Divisional Court in that case, we doubt whether the mere fact that such a Court consists of a High Court Judge is conclusive of the question.

It may, therefore, be said that the fact that the Election Judge comprised of the Chief Judge or a High Court Judge nominated by the Chief Judge is not a conclusive factor in determining the issue whether the Election Judge is a superior or inferior tribunal. Apart from that, I am of the view that the English authorities do not offer us much assistance in view of the differing legislations in the two jurisdictions. I agree with the learned Senior Federal Counsel that the legislation in Ceylon relating to election petition which was considered by the Privy Council in the case of *Goonesinha v. Hon. C.L. De Kretser* [1945] AC 63, is similar to our legislations as may be seen from the judgment of the Privy Council at p. 66, where it said:

> Their Lordships are of opinion that the judgment of the learned Chief Justice is plainly right. By Art. 75 of the Order-in-Council every election petition is to be tried by the Chief Justice or a Judge of the Supreme Court nominated by him, and the Chief Justice or the nominated Judge are referred to in the order as the Election Judge. By cl. 5 of this article it is provided that, unless otherwise ordered by the Chief Justice all interlocutory matters in connexion with a petition may be dealt with and decided by any Judge of the Supreme Court. Article 76 provides that an election petition may be presented to the Supreme Court by one or more of certain classes of persons. These two sections alone would appear to show quite clearly that an election petition is a proceeding in the Supreme Court, and a reference to the rules of procedure which are enacted in sch. VI to the order confirms, if confirmation were necessary, this view. Rule 4 gives the form a petition is to take, and its heading is "In the Supreme Court of Ceylon".

And further at p. 67, it said:

> But their Lordships are of opinion that the true view is that cognizance of these petitions is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court, and consequently *certiorari* cannot be granted to bring up any order made in the exercise of that jurisdiction.

Article 75 of the Ceylon (State Council Elections) Order in Council, 1931 is in *pari materia* with s. 33(1) of the Act, except that instead of a Judge of the High Court, a Judge of the Supreme Court is to be nominated as the Election Judge. The learned Counsel for the applicant seeks to distinguish *Goonesinha* from the present case on the ground that there, the Judge which may be nominated by the Chief Justice is a Judge of the Supreme Court. For that reason, he says, *certiorari* would not lie against the decision of an Election Judge being a Judge of the Supreme Court. With the utmost respect to the learned Counsel, I don't think there is any force in that argument. In my judgment, Judges of the Federal Court, the Court of Appeal and the High Court are Judges of the superior Court as envisaged by the Art. 121 of the Federal Constitution and the Courts of Judicature Act 1964. Thus, adopting the reasoning of Privy Council in *Goonesinha*, it may be said that an election petition is a proceeding in the High Court and cognizance of such a petition is an extension of, or addition to, the ordinary jurisdiction of the High Court, and consequently *certiorari* cannot be issued to bring up any order made in exercise of that jurisdiction. I, therefore, agree with the learned Senior Federal Counsel that *Goonesinha* goes to reinforce the decision of the Supreme Court in *Ignatius Malanjum's* case.

On the above premises the applicant's application for leave to apply for an order of *certiorari* against the decision of the 1st respondent is dismissed. I also order that costs of this application be paid to the Attorney General by the applicant.